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By Hand Delivery

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United States District Judge
United States Courthouse
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New York, NY 10007-1312

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In re Application of the Cromwell Group, Inc., et al., 10 Civ. 167(DLC)
related to *U.S. v. Am. Soc'y of Composers, Authors and Publishers, 41 Civ. 1395 (DLC)*

Dear Judge Cote:

On behalf of ASCAP, I write to set forth ASCAP's opposition to the RMLC's April 5, 2010 letter requesting leave to file a supplemental brief.

First, it is simply inaccurate to state that ASCAP's briefing is inconsistent with any statements that I made at the February 18, 2010 conference. I expressed the view then that, given the complicated issues separating the parties in this proceeding, and the truncated nature of an interim fee proceeding that does not allow for full development of expert and other testimony that will inform the determination of reasonable final fees, the Court should apply the presumption concerning interim fees set forth in AFJ2. That continues to be ASCAP's view.

Second, although the RMLC now claims to be surprised by ASCAP's expert declarations, we advised the RMLC in connection with our discussions leading up to the conference that we would be submitting declarations on music use and the changes in the radio industry. The RMLC cannot, therefore, fairly claim that it did not anticipate declarations from either Dr. Mourdoukoutas or Ms. Flynn. It is true that we did not initially intend to submit a declaration from our expert economist at this stage of the proceeding. However, the short

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description of the RMLC's position shared with ASCAP in advance of the briefing did not lead us to anticipate that the RMLC would be submitting a 20 page economist's declaration purporting to recast the parties' 2004 License Agreement as a matter of "economics" and opining not only on interim fees, but on what fees should be through 2013. (Bigelow Dec. at ¶¶ 11, 44-45). ASCAP never intended to forfeit the right to respond directly and appropriately to the RMLC's submission of economic testimony in the reply papers to which the parties stipulated. Given the \$100 million cut in interim fees sought by the RMLC, it would be patently unfair to deny ASCAP the opportunity to respond.

Third, Professor Kevin Murphy's declaration is entirely and properly a reply submission. It directly responds to the submissions of the RMLC's economist Dr. John Bigelow, and Messrs. Christian and Cummings. Through their testimony, the RMLC asserts that: (a) the radio industry has suffered an unprecedented decline in revenue; (Bigelow Dec. at ¶¶ 14-23) (b) new media applications are not generating substantial revenues; (*Id.* at ¶ 35; Christian Dec. at ¶ 12; Cummings Aff. at ¶ 14) and (c) the recent drop in industry revenue alone warrants a \$100 million cut in interim fee payments to ASCAP. (Bigelow Dec. at ¶¶ 44-45.) In rebuttal, Professor Murphy states that: (a) the claim that the decline in revenue warrants a \$100 million cut in interim fees does not make economic sense; (Murphy Dec. at ¶¶ 14-16); (b) none of the evidence put forth by the RMLC shows any connection between the decrease in revenue and the RMLC Stations' music use or the value of the ASCAP public performance license; (*Id.* at ¶¶ 17-20); and (c) revenue is a particularly poor proxy for the value of new media applications. (*Id.* at ¶¶ 21-23.) Professor Murphy did not say anything about the valuation of the ASCAP license or anything else that is not in direct response to the RMLC's initial papers.

To the extent that the RMLC is asserting that ASCAP was somehow obligated to put in all of its evidence in its initial submission, the assertion not only makes no sense in the context of the two rounds of briefing to which the parties agreed, but is also inconsistent with the RMLC's own approach to reply papers. Although ASCAP advised the RMLC long before the first round of briefing that it would support its interim fee position with evidence of the growth of new media encompassed by the expanded scope of the RMLC license request, the RMLC chose to offer the declaration of Clear Channel's Mr. Meier on reply, presumably because Mr. Meier, like Professor Murphy, replies to arguments specifically raised in the initial briefs.

In sum, because Professor Murphy speaks only to the issues raised in the RMLC's opening papers—issues on which the RMLC has already presented its position to the Court—the RMLC has failed to demonstrate why it should be permitted to file a supplemental brief.

Respectfully submitted,

Jay Cohen

cc: All Counsel (via email)

*Applicant may file
a five page supplementary
brief.*
Denise Cote
April 9, 2010